

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 DAVID T. SHULICK : NO. 16-428

Hamilton had the binder with him on the stand, but defense counsel did not ask him about it on direct examination. When defense counsel concluded, the court permitted the

government to look through the binder. During its extensive cross-examination, the Government asked Hamilton about various documentation and back-up material in the binder. Defense counsel then referenced the binder on redirect examination. No part of the binder, however, was introduced into evidence, read to the court, or marked as an exhibit.

On September 26, 2018, after Hamilton concluded his testimony at the sentencing hearing and after another witness had been sworn in, the Government requested that it be provided with a copy of Hamilton's binder before he "leaves" the courtroom. In response to defense counsel's objection, the court stated, ". . . it [the binder] was referred to, so we may want to put it in the record. So I think that [production to the Government] makes sense." After continued objection by defense counsel, the court instructed Hamilton to make a copy of the binder and supply it to the Government. (See Transcript of September 26, 2018, pp. 185-86).

On October 16, 2018, the defendant filed a notice of appeal of the Court's October 3, 2018 judgment which committed Shulick to prison. On October 19, 2018, the Government wrote to the court that defense counsel was continuing to refuse to produce the binder. In her October 21 response, Defense counsel did not dispute that she had not complied with the court's order. Instead, she simply asserted legal objections to the

production, including that the court no longer had jurisdiction since a notice of appeal had been filed. The Government's pending motions to supplement the record and to compel production were not filed until October 29.

Once the appeal was filed, the power of this court to take action here is limited. The Government relies on that portion of Rule 10(e)(2) of the Federal Rules of Appellate Procedure which allows the district court to supplement the record "if anything material to either party is omitted from or misstated in the record by error or accident. . . ." The binder was omitted from the record by error due to defense counsel's refusal to provide it to the Government after being ordered to do so during defendant's sentencing hearing. The binder contains information related to the basis for Hamilton's calculation of fraud loss that defendant offered to the court during sentencing. The Government repeatedly challenged portions of the binder in its cross-examination of Hamilton to attempt to discredit defendant's proposed fraud loss calculation. The court ultimately rejected Hamilton's testimony and adopted the position of the Government after considering Hamilton's testimony, including the Government's cross-examination. The contents of the binder are therefore "material" as required by Rule 10(e)(2).

Accordingly, Hamilton's binder of work papers will be made part of the record. Defense counsel is ordered to make the binder available to the Government forthwith so that the record can be properly supplemented.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	
v.	:	
	:	
DAVID T. SHULICK	:	NO. 16-428

ORDER

AND NOW, this 17th of December, 2018, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

(1) the motion of the Government to supplement the record (Doc. # 228) is GRANTED;

(2) the motion of the Government to compel (Doc. # 229) is GRANTED; and

(3) Defense counsel shall comply with this order forthwith.

BY THE COURT:

/s/ Harvey Bartle III

J.